

ARTICLE 12772

APPEALS TO THE MERIT SYSTEMS PROTECTION BOARD (MSPB)

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SUBARTICLE 1. GENERAL PROVISIONS

1 1. Purpose. To publish policy and procedures governing representation before the Merit Systems Protection Board (MSPB).

1 2. Applicability. The following employees may appeal to MSPB:

a. Members of the Senior Executive Service (SES).

b. Individuals in the competitive service who are not serving a probationary or trial period under an initial appointment or who have completed one year of current continuous employment under other than a temporary appointment limited to one year or less.

c. Preference eligible individuals in the excepted service who have completed one year of current continuous service in the same or similar position.

d. Individuals who occupy a professional and administrative career position on Schedule B of Part 213 of 5, Code of Federal Regulations (CFR), provided that they have completed a trial period of one year after initial appointment in such a position.

e. Individuals terminated from the competitive service while serving a probationary period or while serving a trial period under a Veterans Readjustment Appointment in the excepted service, who allege discrimination because of partisan political reasons or marital status or who allege that the termination was taken for pre-appointment conditions and was procedurally improper as provided by 5 CFR 1201.1(a)(8).

1 3. Appealable Actions. Actions covered by 5 CFR 1201.2 and 1201.3 are appealable to the MSPB.

1 4. Definitions

a. Activity. A field installation, headquarters command, or office.

b. Administrative Record. Any written document or evidence developed during the adjudication of the appeal.

c. Days. Calendar days.

d. Final Decision. A decision rendered by the Board or an initial decision which has become final as a result of not being contested or as a result of the Petition for Review (PFR) being denied.

e. Initial Decision. A decision made by the presiding official in response to a petition for appeal. Initial decisions become final after 35 days unless a PFR is filed with the Board.

f. Management Representative. Any individual authorized to represent the activity during the hearing before the Administrative Judge or who prepares a PFR or Response to a Petition for Review (RPFR).

g. Merit Systems Protection Board. An independent agency established to safeguard both the merit system and individual employees against abuses and unfair

personnel actions. The Board hears and decides employee appeals and orders corrective and disciplinary actions against an employee or agency when appropriate. The MSPB is composed of eleven Regional Offices which render initial decisions and a three member Board in Washington, D.C. which may accept petitions of initial decisions for review and decision.

h. Petition for Appeal. A request filed by an appellant with a MSPB regional office for review of an agency action.

i. Petition for Review (PFR). A request filed with the three member Board for review of an initial decision of an Administrative Judge.

j. Policy Issue. An issue which, if made the subject of a definitive ruling by the Board, may have a substantial impact on any policy established by an agency or establishes a new policy within the DON.

k. Precedential Issue. An issue which has general applicability of a significant nature and which, if made the subject of definitive ruling by the Board, will establish a rule which will govern the disposition of subsequent cases dealing with the same or a similar issue.

l. Administrative Judge. Any person authorized by the Board to preside over any hearing or to make a decision on the record, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any of the members of the Board.

m. Response to a Petition for Review (RPFR). A written document which responds to the arguments raised by the opposing party in its PFR.

n. Sensitive Issue. Refers to an issue which, if made the subject of a definitive ruling by the Board, may have an adverse impact on the interests of the agency.

1 5. Responsibilities. This subarticle applies to Department of Navy (DON) activities only. Non-Navy activities must contact the HRO for guidance.

a. Human Resources Operations Center (HROC). HROC shall exercise exclusive representational authority and serve as the sole representative for DON in all dealings with the MSPB, in cases which involve policy, precedential or sensitive issues. HROC will notify the HRSC office, the Commandant of the Marine Corps (CMC), and activities when exclusive representational authority is exercised.

b. OCPM Regional Offices and the CMC

(1) HRSC Regional offices are authorized to prepare and submit all PFRs and RPFRs except those identified in paragraph 1 5a.

(2) HRSC Regional offices may delegate to activities on a case by case basis responsibility for representation before the MSPB in PFRs and RPFRs, provided the activity uses a trained representative.

c. Activity Heads. Activity heads or a designated representative are authorized to represent their activity before MSPB Administrative Judges on any petition for appeal. Further, activity heads or their designated representative may file PFRs and RPFRs, if so authorized by their servicing OCPM Regional Office or CMC. In connection with these

authorities, activity heads may seek assistance and advice from their servicing Human Resources Office (HRO), legal staff, and Judge Advocate General Corps (JAGC).

d. Management Representative. The management representative is responsible for:

(1) Representing the activity before the Administrative Judge, if that responsibility is delegated by the activity head. This responsibility may include the following:

(a) Becoming thoroughly familiar with the facts of the case, obtaining assistance from subject area specialist if needed;

(b) Being knowledgeable of the rules of the Board;

(c) Developing a theory of the case which is consistent with the facts which management wants to present;

(d) Considering what, if any, affirmative discovery procedures are appropriate in the preparation of the agency's case and responding to all discovery initiated by the appellant;

(e) Presenting management's case through the testimony of witnesses, interrogatories, exhibits, etc.; and

(f) Preparing and filing a post-hearing brief, if desirable or if directed to do so by the Administrative Judge to complete the case.

(2) Preparing petitions for review to the Board or responses to the appellant's petition for review to the Board.

(3) Binding management to actions by agreement or factual admissions by stipulation.

(4) Forwarding the case file to the servicing HRO subsequent to the initial decision becoming final or when all pleadings have been filed before the Board.

e. Human Resources Office (HRO)

(1) Provide procedural information to employees regarding their appellate rights as defined in 5 CFR 1200.1202 and 1203.

(2) Provide advice and assistance to activity heads and management representatives, as requested.

(3) Maintain a case file for each appellant as required in paragraph 1-6.

1 6. Case Files for MSPB Appeals

a. Case files shall contain copies of:

(1) Information required by an appropriate CPI governing the appealable action.

(2) The administrative record.

(3) Initial decision.

(4) PFRs and RPFRs.

(5) Any other correspondence between MSPB and the agency.

(6) MSPB's final decision.

b. The case file shall be maintained by HRO for a period of four years after final adjudication.

1 7. Procedures for Filing an Appeal to the MSPB

Employees identified in paragraph 1 2 of this Article will use the procedures outlined in 5 CFR 1200, 1202, and 1203 when filing appeals to the MSPB.

1 8. Choice of Procedure

a. For an employee covered by a collective bargaining agreement, the negotiated grievance procedure contained in the agreement is the exclusive procedure for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(1) An appealable action involving discrimination under 5 USC 2302(b)(1), reduction in grade or removal under 5 USC 4303, or adverse action under 5 USC 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(2) Any appealable action that is excluded from the application of the negotiated grievance procedure may be raised only under the Board's appellate procedures.

b. Choice of procedure. When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first.

c. Review of discrimination grievances. If an employee chooses the negotiated grievance procedure under paragraph 1 8b and alleges discrimination as described at 5 USC 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with 5 CFR 1201.154.